

<sup>1</sup> The Judge also entered an October 17, 2008, Nunc Pro Tunc Order to correct the October 6, 2008, Award with regard to administrative costs.

February 19, 2006. In the October 6, 2008, Award, Judge Clark determined claimant sustained a 10 percent impairment to each arm for bilateral carpal tunnel syndrome. The Judge consequently granted claimant permanent partial disability benefits under K.S.A. 44-510d for two scheduled injuries. The Judge also found that claimant's October 2006 right shoulder surgery was precipitated by the work she performed for respondent and, therefore, the Judge concluded that surgery should be paid by respondent. In addition, the Judge found claimant was paid seven weeks of temporary total disability benefits while she was being paid wages by her subsequent employer, RJR Financial Services (RJR). Consequently, the Judge determined respondent was entitled to receive "a dollar for dollar credit against this Award in the total amount of \$3,269.00."<sup>2</sup>

Claimant appealed the October 6, 2008, Award. Claimant, however, acknowledges that she initiated this appeal because in a related claim, Docket No. 1,021,347, the employer (Bombardier Aerospace/Learjet) appealed an award of increased permanent disability benefits entered in that claim. In short, claimant argues that if additional work disability<sup>3</sup> is not granted in the review and modification proceeding against Bombardier Aerospace/Learjet then work disability should be granted in this claim. Accordingly, claimant conditionally requests the Board to affirm the Judge's findings that she has sustained a 10 percent impairment to each upper extremity. In all events, claimant requests ongoing medical benefits at respondent's expense with a designated physician so she might receive prompt treatment for any future flare-ups she may experience.

In addition, claimant argues respondent should not receive a credit for the entire seven-week period that she was off work for medical treatment following right shoulder surgery and simultaneously received temporary total disability benefits from respondent and wages from RJR as any credit (or, in essence, reduced number of weeks of temporary total disability benefits) should be limited to three weeks in which she was working part-time.<sup>4</sup> Claimant maintains she had a salary continuation agreement with RJR, which should not affect her right to receive temporary total disability benefits from respondent.

Respondent also contends Judge Clark erred. Respondent requests the Board to reverse the Judge's finding that claimant is entitled to a 10 percent impairment to each arm. Additionally, respondent argues claimant's right shoulder condition was a natural and probable consequence of claimant's 2003 work-related injury with Bombardier

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<sup>2</sup> ALJ Award (Oct. 6, 2008) at 7.

<sup>3</sup> A permanent partial disability under K.S.A. 44-510e that is greater than the functional impairment rating.

<sup>4</sup> Claimant acknowledges she may have a claim for temporary partial disability benefits during that three-week period but she is not requesting those benefits.

Aerospace/Learjet and, therefore, respondent should not be required to pay for that treatment. Finally, respondent asserts that, based upon the *Casco*<sup>5</sup> decision, claimant is not entitled to any award of work disability in this claim as her bilateral upper extremity injuries fall under the schedule of K.S.A. 44-510d.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Is claimant entitled to temporary total disability benefits for the seven-week period in which she was recuperating from right shoulder surgery but she was also paid wages from her present employer, RJR Financial Services?
3. Should respondent be held financially responsible for the right shoulder surgery claimant underwent in October 2006?
4. Should respondent be required to designate at this time an authorized physician for claimant to consult for future medical treatment?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties agreed to consolidate this claim with Docket No. 1,021,347, for purposes of taking evidence. At the June 12, 2008, hearing before Judge Clark, the parties represented the claims against Bombardier Aerospace/Learjet (Bombardier) and The Arnold Group (Arnold) were interrelated.<sup>6</sup> Accordingly, the Judge approved the parties'

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<sup>5</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

<sup>6</sup> In Docket No. 1,021,347 Bombardier argues claimant voluntarily quit her job with Arnold in February 2006 and, therefore, her increased wage loss was self-imposed. In that claim Bombardier also argues the alleged injury claimant sustained working for Arnold was an intervening injury that terminated claimant's right to seek additional benefits from Bombardier for her February 5, 2003, accident and that any additional work disability claimant sustained should be assessed against Arnold. Conversely, claimant argues in both claims that her temporary job with Arnold was due to end and that she was never restricted from performing that work except for a brief period following right carpal tunnel release and right shoulder surgeries. In short, claimant argues she is entitled to an increased work disability for increased wage loss in her claim against Bombardier and, if not in that claim, she maintains she is entitled to receive a work disability in this claim against Arnold.

agreement that these claims would be tried together, but separate awards would be issued.<sup>7</sup>

A brief review of Docket No. 1,021,347 is helpful and places this matter in context. The subject of Docket No. 1,021,347 is a February 5, 2003, accident that occurred during the course of claimant's employment with Bombardier. On that date claimant fell at work and dislocated her right shoulder, tore her right rotator cuff, and broke her right upper arm. In an Award dated February 10, 2006, Judge Clark found claimant's date of accident was February 5, 2003, and that claimant had sustained a 20 percent whole person impairment for permanent injuries she sustained to her neck and right upper extremity. The Judge also determined claimant sustained a 25.5 percent work disability under K.S.A. 44-510e, commencing January 27, 2005, which was the approximate date claimant was laid off by Bombardier.

Claimant's 25.5 percent work disability represented a 25 percent task loss and a 26 percent wage loss. That wage loss was based upon the post-injury wages that claimant was earning working for Arnold, where claimant had commenced working on May 23, 2005. And Arnold, which is a temporary employment agency, assigned claimant to work at Bombardier.

Bombardier appealed to this Board the February 10, 2006, Award, which affirmed the Judge's finding that claimant had sustained a 20 percent whole person impairment as measured by the *AMA Guides*.<sup>8</sup> The Board, however, reduced claimant's task loss to 18.5 percent. Accordingly, in its June 30, 2006, Order, the Board reduced claimant's work disability to 22 percent, which commenced April 29, 2005, or the day after Dr. Paul S. Stein released claimant as having reached maximum medical improvement.

The Board also noted in its findings that claimant's work for Arnold was aggravating her symptoms. In its June 2006 Order, the Board wrote in part:

Claimant now works at [Bombardier] as a temporary worker through The Arnold Group. She works 40 hours per week plus 10 to 15 hours overtime and works on a computer most of the time. No one from The Arnold Group supervises her work. She reports to a supervisor at [Bombardier].

Claimant filled out the application for employment at The Arnold Group on May 13, 2005. She did not fill out any form from The Arnold Group that asked

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<sup>7</sup> R.H. and R.M.H. Trans. at 8.

<sup>8</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

anything about her physical condition. No one from The Arnold Group asked her anything about her workers compensation claim. She testified that she did not tell The Arnold Group about her restrictions because she had been asked by Joni Holding, the human resources representative at [Bombardier], to submit an application because [Bombardier] wanted to hire her for employment through The Arnold Group. She knew that [Bombardier] was aware of her restrictions.

Claimant's first day of work as a temporary employee at [Bombardier] through The Arnold Group was May 23, 2005. She has had a flare-up of her condition because of the constant typing she is now doing. Claimant said she currently wakes up feeling well, but as the day progresses, the numbness comes into her fingers and her shoulder and neck hurts. She has continuous pain in her shoulder and neck caused by constant computer work. Because her shoulder was not getting better, the fingers continued to tingle, and her neck kept hurting, she returned to Health Services in June 2005. . . .

Claimant testified that there has been no occasion since her employment with The Arnold Group that she has been asked to do something she felt was outside her restrictions or that she told anyone she could not do. Her current job at [Bombardier] is within her restrictions, although she feels she is overdoing it and needs to get up and take breaks.<sup>9</sup>

### **Claimant leaves The Arnold Group and seeks additional medical treatment**

While the February 10, 2006, Award was pending review before this Board, claimant quit her job with Arnold. February 19, 2006, was claimant's last day of work. The next day claimant began working for RJR for lower wages preparing income tax returns and performing other tasks.

Claimant promptly filed a request in Docket No. 1,021,347 to review and modify the February 10, 2006, Award against Bombardier due to a decrease in pay and changed conditions. The Division of Workers Compensation received that application on February 28, 2006. And two weeks later claimant filed an application for hearing in this claim, Docket No. 1,027,918, in which she alleged she had injured both shoulders, arms, her neck and back working for Arnold.

On May 2, 2006, Judge Clark conducted a hearing at which claimant requested medical treatment from either Bombardier or Arnold. At that hearing claimant testified that when she began working for Arnold her work was similar (other than the long hours she put in for Arnold) to the work she was doing for Bombardier when she was laid off in

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<sup>9</sup> *Wohlford v. Bombardier Aerospace/Learjet*, No. 1,021,347, 2006 WL 1933441 (Kan. WCAB June 30, 2006).

early 2005. She also testified that in either late October or early November 2005 her job duties changed from doing computer work in an office setting to working on the warehouse floor where she pulled parts and took them back to her computer where she would match part numbers and serial numbers with computer data. The warehouse job sometimes required overhead reaching and carrying heavy parts, such tasks she avoided by seeking assistance from co-workers. At the May 2006 hearing, claimant testified she believed the warehouse job exceeded the work restrictions that Dr. Stein had previously recommended for her neck injury.<sup>10</sup>

But, as indicated above, even before the warehouse job claimant experienced increased symptoms in her neck, right shoulder, and arms as she had sought additional medical treatment in either June or July 2005 at the Bombardier medical facility, where she was prescribed physical therapy. Claimant primarily attributed those increased symptoms to the long hours she was working for Arnold. Indeed, the last week she worked for Arnold claimant worked 62 hours. Moreover, claimant testified at the May 2006 hearing she quit Arnold's employment because she "just couldn't hardly take it anymore."<sup>11</sup> In short, she was experiencing more pain, taking more pain pills, having more headaches, having more severe headaches, her neck and shoulder hurt, and she was having more numbness and tingling in her fingers and arms.

Nevertheless, another major factor in claimant's decision to leave Arnold's employment was that she had a job offer from RJR, where she would prepare tax returns and perform other clerical work, which she felt would be better suited to her physical abilities and within her permanent work restrictions. In February 2006 claimant knew tax returns were piling up at RJR and she was concerned she might lose that job. At that time claimant also knew her job with Arnold was only temporary and she had been told her job would probably end in February 2006. She was first told her job would end in late 2005, next she was told it would end in mid-January, and she was then told the job would end in late February.

### **Claimant's wages working for RJR Financial Services**

As indicated above, Arnold and claimant stipulated at oral argument before the Board that her average weekly wage for the alleged injuries she sustained while working

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<sup>10</sup> In its June 30, 2006, Order, the Board found Dr. Stein recommended permanent restrictions of avoiding repetitive overhead work and activity that required repetitive bending or twisting of the neck. And those restrictions were provided for claimant's cervical spine problems.

<sup>11</sup> P.H. Trans. (May 2, 2006) at 16.

for Arnold was \$847.95.<sup>12</sup> Claimant's job with RJR paid her less than that. According to the Form 1099s from RJR, claimant earned wages and bonuses totaling \$22,595 in 2006<sup>13</sup> and \$27,175 in 2007. She is paid as an independent contractor and, therefore, she is responsible for the taxes on her income. RJR does not provide claimant with health insurance.

When claimant began working for RJR she earned \$400 per week in salary. According to a spreadsheet from RJR, claimant has been given various raises and bonuses. For the week ending June 20, 2008, claimant's salary was raised to \$575 per week. In addition, as of August 2008 (when she last testified) claimant had been paid \$760 in bonuses during 2008.<sup>14</sup> RJR generally pays claimant her weekly salary regardless of the hours she works. And RJR oftentimes pays claimant a bonus before she leaves on a trip. Nonetheless, she did not receive any pay for a week in May 2008 when she went to a conference in Florida. Through July 18, 2008, RJR had paid claimant a total of \$16,285 during 2008 for a period of 28 weeks (or 29 weeks if one includes the week in May that she was not paid a weekly salary).

#### **Temporary total disability benefits following claimant's 2006 surgeries**

On August 1, 2006, claimant underwent right carpal tunnel release surgery and on October 3, 2006, she underwent right shoulder surgery. Following the carpal tunnel surgery claimant was able to perform some work such as answering the phone. And RJR continued to pay her. According to claimant she sent the temporary total disability check that she had received back to her attorney for its return. Accordingly, she testified she did not receive temporary total disability benefits for the weeks of August 4, August 11, and August 18, 2006.<sup>15</sup>

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<sup>12</sup> In Docket No. 1,021,347, Bombardier and claimant stipulated claimant's average weekly wage on February 3 [*sic*], 2003, was \$935.20 and on January 27, 2005, her average weekly wage was \$967.60. Those parties also stipulated the weekly value of claimant's fringe benefits on February 5, 2003, was \$270.27 but the weekly value on January 27, 2005, was \$319.26. And, finally, they agreed claimant's fringe benefits terminated on February 8, 2005. Neither Bombardier nor claimant challenged the Judge's finding in the February 10, 2006, Award that claimant sustained a 26 percent wage loss due to her layoff from Bombardier. That finding was based upon a pre-injury wage of \$1,205.47 (which included fringe benefits) and a post-injury wage at Arnold of \$879.72. That 26 percent wage loss finding was not disturbed on appeal.

<sup>13</sup> Claimant testified that she believed she was off work for surgery from approximately August through November 27, 2006, and that she did not receive wages while she received temporary total disability benefits. R.H. and R.M.H. Trans. at 41, 42.

<sup>14</sup> Wohlford Depo. (Aug. 4, 2008) at 6.

<sup>15</sup> *Id.* at 10.

While recuperating from the October 3, 2006, right shoulder surgery, claimant received seven weeks of salary from RJR. The first four of those seven weeks claimant did not perform any work. But during the last three weeks claimant worked part-time from 10 to 20 hours per week. During the four weeks that claimant did not work, her right arm was in a sling, she was taking pain medications, and Dr. Gluck had her under restrictions. Claimant received temporary total disability checks for all seven weeks.

### **Medical opinions**

#### **Dr. James L. Gluck**

Dr. Gluck, who is the orthopedic surgeon who first operated on claimant's right shoulder in February 2004, initially released claimant with restrictions in June 2004. But she returned to him in October 2004 with additional right shoulder pain. The doctor advised claimant he did not believe her shoulder would return to normal due to the massive rotator cuff tear she had sustained, along with a retracted tendon. The doctor told claimant she would never have normal strength in her right shoulder and she would have intermittent shoulder discomfort. In December 2004 claimant reported to the doctor she had numbness in her right hand, which had started approximately 2 months before. Dr. Gluck injected claimant's right shoulder and ordered a nerve test for both upper extremities, which tested normal.

In July 2005, the doctor rated claimant as having a 17 percent impairment to her right upper extremity due to the rotator cuff tear and a 5 percent impairment to the right upper extremity due to numbness (related to carpal tunnel syndrome<sup>16</sup>). Combining those ratings, Dr. Gluck concluded claimant had a 22 percent impairment to the right upper extremity. The doctor did not attempt to rate what impairment, if any, claimant had in any other part of her body.

In June 2006 Dr. Gluck again began treating claimant for increased right shoulder pain, which claimant attributed to a lot of lifting in the warehouse at Bombardier. Claimant also told the doctor that she had quit her job in February 2006 due to the worsening pain. Claimant also had symptoms in her right wrist. The doctor repeated the nerve tests, which this time indicated claimant had moderate carpal tunnel syndrome on the right and mild carpal tunnel syndrome on the left. Consequently, on August 1, 2006, the doctor performed a right carpal tunnel release.

In September 2006 Dr. Gluck wrote Arnold's attorney that he believed claimant's increased right shoulder complaints and the need for medical treatment were related to the

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<sup>16</sup> Gluck Depo. (Aug. 4, 2008) at 31.



work claimant had performed in the warehouse at Bombardier. Nonetheless, at his August 2008 deposition, the doctor added that the clerical work claimant was performing at RJR also contributed to claimant's need for the medical treatment she received from him in 2006. The doctor testified in part:

Q. (Mr. Burnett) So you certainly agree that the necessity of additional medical treatment that you were required to provide in 2006 is related to that increased symptomatology and clinical findings related to the history that she provided to you of working in a warehouse immediately before presentation to you?

A. (Dr. Gluck) That, and the additional clerical work that she was doing at RJR Investments, exactly.<sup>17</sup>

The doctor acknowledged, however, that claimant did not attribute any aggravation or worsening of her condition to the work she performed for RJR.

On October 3, 2006, Dr. Gluck performed a right shoulder arthroscopy on claimant. During that surgery the doctor debrided the scar tissue or adhesions that were in the shoulder. Moreover, he found the repair he had done earlier was intact. According to Dr. Gluck the scar tissue was not unexpected as it often develops following a large rotator cuff tear repair. The doctor found no evidence of trauma other than what he first repaired in 2004.

In August 2007 Dr. Gluck rated claimant's right upper extremity for a second time. The doctor did not modify the rating he gave claimant in July 2005, which was based upon his then most recent visit with claimant in December 2004. The doctor acknowledged, however, that claimant's right upper extremity impairment immediately before surgery was 10 percent due to her carpal tunnel syndrome. Dr. Gluck did not rate the left upper extremity as he did not believe claimant's symptoms warranted a rating or any further treatment.

Although claimant's impairment rating did not change, Dr. Gluck modified claimant's restrictions. In December 2004 the doctor restricted claimant's lifting to the range of zero to 20 pounds and also restricted her to limited overhead work with the right hand. But when the doctor released claimant in March 2007, he restricted her lifting to the range of zero to 10 pounds with the right arm and restricted her to limited overhead work and reaching with the right arm (which was in the doctor's progress notes but not in the

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<sup>17</sup> *Id.* at 38.

December 23, 2004, work progress slip).<sup>18</sup> The doctor explained his reasoning for changing claimant's weight lifting restriction:

Because at the time I thought that was the appropriate restriction, and I think that looking at it it became obvious, don't you think, that I treated her and she went back and she was doing lifting activities and she got worse. So hopefully I will prevent her from running in to problems again.<sup>19</sup>

Finally, Dr. Gluck indicated he used the *AMA Guides* in providing his ratings. Moreover, the doctor did not recommend any additional medical treatment for claimant's right shoulder or wrist.

**Dr. Chris D. Fevurly**

Dr. Fevurly, who first examined claimant at Bombardier's request in August 2005, examined claimant again in early August 2008. In 2005 the doctor rated claimant as having a 12 percent impairment to her right upper extremity for her right shoulder injury and a 5 percent whole person impairment for her cervical spine injury. But based upon the 2008 examination and using the *AMA Guides*, the doctor determined claimant now had a 10 percent right upper extremity impairment due to her shoulder injury as her range of motion had improved. There was no change in the impairment for claimant's neck. Dr. Fevurly determined claimant now had a 5 percent impairment in each upper extremity from her bilateral carpal tunnel syndrome.

The doctor did not modify the restrictions that he recommended in 2005, which were no prolonged or repetitive overhead reaching or forceful overhead use of the right arm, no prolonged overhead looking, no lifting greater than 60 pounds, no lifting 50 pounds on more than an occasional basis, and no lifting greater than 30 pounds to chest level on more than a frequent basis.

Claimant told Dr. Fevurly about the work she performed for Arnold. She told the doctor that her job required lifting of 20 to 40 pounds but she never did that lifting as she had a male co-worker do it for her. Dr. Fevurly concluded the prolonged keyboard and data entry work that claimant performed for Arnold from May 2005 to February 2006 caused her bilateral carpal tunnel syndrome. The doctor noted at the time of his examination in August 2005 that claimant was then working 50 to 56 hours per week performing computer work the entire day for Arnold and that such work had aggravated claimant's neck and right shoulder symptoms.

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<sup>18</sup> *Id.* at 50.

<sup>19</sup> *Id.* at 51.

Dr. Fevurly also believed claimant performed repetitive computer activity at RJR that aggravated her carpal tunnel syndrome.<sup>20</sup> But he further explained that such aggravation did not form a basis to assign any additional impairment.<sup>21</sup>

Finally, Dr. Fevurly testified he believed the October 2006 right shoulder surgery was a natural and probable consequence of the trauma that claimant sustained in 2003 when she was working for Bombardier.<sup>22</sup>

### **Dr. Paul S. Stein**

Dr. Stein, who treated claimant from January through April 2005 and subsequently evaluated her at Arnold's request in May 2006, examined and evaluated claimant again in July 2008. But this time the evaluation was requested by Bombardier. The doctor determined that the impairment to claimant's neck had not changed and that claimant's right shoulder did not merit any greater impairment than what Dr. C. Reiff Brown found in 2005. Although Dr. Stein did not address claimant's right shoulder in 2005, he did recommend restrictions following the 2008 examination and suggested that claimant avoid activity with her right hand above shoulder level or more than 24 inches away from her body, avoid reaching behind her body, and limit right arm lifting to no more than 10 pounds up to chest level.

Dr. Stein determined claimant had a 10 percent impairment in each upper extremity due to carpal tunnel syndrome, which the doctor attributed predominantly to the work claimant performed for Arnold. Moreover, the doctor felt claimant should avoid intensive repetitive activity with either hand and she should avoid using vibrating or impacting power tools due to the bilateral carpal tunnel syndrome.

Regarding claimant's October 2006 right shoulder surgery, Dr. Stein testified that he believed, based upon the history provided, the work claimant performed for Arnold aggravated, accelerated or contributed to the development of the adhesions in her right shoulder.<sup>23</sup> In short, Dr. Stein related the work claimant performed for Arnold to her need for the October 2006 right shoulder surgery.

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<sup>20</sup> Fevurly Depo. (Aug. 8, 2008) at 24, 25.

<sup>21</sup> *Id.* at 38.

<sup>22</sup> *Id.* at 22.

<sup>23</sup> Stein Depo. (Aug. 7, 2008) at 17.

**Dr. C. Reiff Brown**

Dr. Brown, who is a board-certified orthopedic surgeon, first examined claimant in May 2005, shortly before she began working for Arnold. The doctor examined claimant a second time in mid-March 2008. Both examinations were performed at claimant's attorney's request. And both times the doctor rated claimant's impairment using the AMA *Guides*.

Following both examinations Dr. Brown determined claimant had a 5 percent whole person impairment due to her neck and cervical spine. But in 2008 the doctor also diagnosed myofascial pain syndrome in claimant's upper back, which comprised an additional 5 percent whole person impairment.

Also following both examinations the doctor found claimant had a 7 percent impairment to her right upper extremity for lost range of motion in the shoulder. But the doctor found less crepitus in the right shoulder in 2008 (likely due to the surgery performed by Dr. Gluck in 2006) and the doctor, therefore, reduced the rating for that condition from 12 percent to 6 percent to the right upper extremity. In 2005 Dr. Brown found claimant had a 10 percent right upper extremity impairment due to weakness of abductor function. But the doctor did not provide a rating for that condition in 2008, which he attributes to possible oversight. In 2008, however, the doctor found claimant had a 10 percent right upper extremity impairment due to carpal tunnel syndrome. The doctor did not comment upon the left upper extremity.

Dr. Brown found claimant's right upper extremity impairment was 27 percent in 2005 and that impairment was 22 percent in 2008. The doctor also found claimant had a 20 percent whole person impairment due to her neck and right shoulder in 2005 but in 2008 she had a 21 percent whole person impairment from her neck, right shoulder, upper back and right arm.<sup>24</sup>

Dr. Brown attributed claimant's carpal tunnel syndrome to her work at Arnold.<sup>25</sup> But the doctor believed the myofascial pain syndrome in her upper back was a natural consequence of her February 2003 injury at Bombardier.

It appears the doctor attributed the October 2006 right shoulder surgery performed by Dr. Gluck to claimant's February 2003 accident.<sup>26</sup> But on cross-examination the doctor

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<sup>24</sup> Brown Depo. (June 13, 2008) at 25.

<sup>25</sup> *Id.* at 26.

<sup>26</sup> *Id.* at 30.

admitted he could not state either way within a reasonable medical certainty whether claimant would have needed the October 2006 surgery had she not worked for Arnold.<sup>27</sup> The doctor also testified it was common for someone to undergo surgery at a later date to address the adhesions that naturally form in a shoulder following a torn rotator cuff. But the doctor also testified that repetitive work or trauma would likely speed the development of the adhesions depending upon the severity of the trauma.

The doctor did not modify the restrictions he had recommended for claimant's neck injury following his 2005 examination. Accordingly, Dr. Brown continues to believe that claimant should avoid work that involves frequent extension and rotation of her cervical spine. In addition, the doctor did not modify his opinion that due to her shoulder injury claimant should avoid frequently using her right hand above chest level and avoid frequently reaching away from her body more than 18 inches. But the doctor did somewhat modify claimant's lifting restrictions. In 2005 Dr. Brown recommended that claimant limit her lifting *with both arms* to no more than 20 pounds occasionally and 10 pounds frequently. In 2008, however, the doctor indicated claimant should limit the lifting *with her right arm* to 15 pounds occasionally and 10 pounds frequently. According to the doctor, the 2005 lifting restrictions were primarily for claimant's shoulder and to some extent also for her neck. And, likewise, the 2008 lifting restrictions were primarily for claimant's shoulder and to some extent also for her neck and myofascial pain syndrome.<sup>28</sup> The record is not clear if the doctor found claimant should be further restricted for the aggravation that she sustained working for Arnold.

Regarding the right carpal tunnel syndrome, Dr. Brown recommended that claimant avoid work that required frequently extending or flexing the right wrist greater than 30 degrees, frequently grasping (such as is required with pliers, scissors and similar hand tools), and vibratory tools. Dr. Brown did not believe claimant had lost any additional work tasks due to her neck and shoulder injuries or the resulting myofascial pain condition over and above what he had identified in 2005.

Finally, the doctor testified that claimant's conditions were inclined to fluctuate due to weather changes and her activities. Therefore, the doctor believes claimant will need some conservative treatment such as anti-inflammatory medications, injections, or short courses of physical therapy for flare-ups that may occur. Moreover, the doctor believes that claimant should have an authorized physician on hand and that she not be required to wait three to six months to see a doctor.<sup>29</sup> Moreover, the doctor believes claimant

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<sup>27</sup> *Id.* at 60.

<sup>28</sup> *Id.* at 36.

<sup>29</sup> *Id.* at 39.

should have an authorized doctor to prescribe and renew the prescriptions she has for the vertigo she has experienced since the February 2003 accident.

### CONCLUSIONS OF LAW

#### **Nature and extent of claimant's permanent disability**

The Board affirms the Judge's conclusion that Arnold is responsible for paying claimant's medical benefits and disability compensation for her bilateral carpal tunnel syndrome.

The greater weight of the evidence establishes that claimant developed bilateral carpal tunnel syndrome while working for respondent. Claimant's testimony is uncontradicted that while employed by Arnold she spent most of her day on a computer and worked many overtime hours. During her last week with Arnold she worked 62 hours.

Claimant's testimony is credible and persuasive. At the June 2008 hearing claimant testified she often worked 11 or 12 hours per day for Arnold, which increased the symptoms in her neck, right shoulder, and right hand and arm. Before working for Arnold claimant had undergone a nerve conduction study on her right arm, which was negative, and to the best of her knowledge she had never been diagnosed as having carpal tunnel syndrome. Claimant testified, in part:

While I was with The Arnold Group, the pain got worse as I continued to work on the floor. At Bombardier, I would say that the pain was a little different, because of the extreme injury that I had, I had a completely torn rotator cuff, and so the pain was there and it started to help -- get better, but when I started to work at The Arnold Group, it started to increase in pain as I worked along.

. . . .

I would say the constant keyboarding and the parts that I had to go get while on the shelves, although I was very careful at what I did, and if there were parts that were up high, I did ask for help to get those down.<sup>30</sup>

In sharp contrast the work claimant performs for RJR has not aggravated her injuries. RJR accommodates claimant's injuries by providing someone to do any lifting that is required, allowing her to work at her own pace, and permitting her to take breaks and

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<sup>30</sup> R.H. and R.M.H. Trans. at 23, 24.

rotate tasks as needed.<sup>31</sup> Moreover, RJR lets claimant take time off work when needed due to her neck and shoulder pain. Claimant has not required any medical treatment for her right shoulder or arm since the doctor released her following her 2006 surgeries.

In short, the work claimant performed for Arnold caused claimant to develop bilateral carpal tunnel syndrome. That conclusion is supported by the greater weight of the medical evidence and by claimant's testimony. The Board also affirms the Judge's finding that claimant has sustained a 10 percent impairment to each upper extremity as a result of that condition. That was the opinion provided by Dr. Stein, who evaluated claimant once at Arnold's request and once at Bombardier's request. And the Board finds that opinion credible.

The Board also finds the long hours claimant spent keyboarding while working for Arnold worsened the symptoms in her neck and right shoulder and accelerated her need for another surgery. Moreover, the somewhat more physically demanding work of pulling and carrying aircraft parts further increased her symptoms. The Board finds, however, that claimant did not sustain any additional permanent impairment to her neck or right shoulder due to that work. The aggravation to claimant's neck and right shoulder was temporary. Indeed, claimant testified that following her October 2006 right shoulder surgery, her right shoulder felt better than it had when she left Bombardier's employment.

Claimant has sustained two injuries that are listed in the schedule of K.S.A. 44-510d. Under *Casco*,<sup>32</sup> there is a presumption of permanent total disability. But that presumption is rebutted as claimant is employed by RJR. As claimant retains the capacity to perform substantial and gainful employment she is entitled to receive benefits for two scheduled injuries – a 10 percent permanent partial disability to the right upper extremity at the level of the forearm and a 10 percent permanent partial disability to the left upper extremity at the level of the forearm.

### **Temporary total disability benefits**

An injured worker is entitled to receive temporary total disability benefits when on account of an injury the worker has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.<sup>33</sup> And if an injured worker is overpaid temporary total disability benefits, the credit for the overpayment shall be

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<sup>31</sup> *Id.* at 29, 30.

<sup>32</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

<sup>33</sup> See K.S.A. 44-510c(b)(2).

applied to the final weeks of any additional compensation the worker is entitled to receive.<sup>34</sup> Moreover, an employer who voluntarily pays unearned wages in addition to the disability benefits the injured worker is entitled to receive under the Workers Compensation Act is entitled to a credit for those unearned wages.<sup>35</sup> But that credit is not applicable when the payment of the unearned wages was made due to an agreement between the employer and the employee (or the employee's labor union) or when the payments were made by a subsequent employer.

For the seven-week period in question following claimant's October 2006 shoulder surgery, Arnold paid claimant temporary total disability benefits as RJR continued to pay claimant's salary. Claimant did not work the first four of those weeks but she did work part-time during the last three weeks. Consequently, the Board finds claimant was temporarily and totally disabled for the first four weeks of the period in question and, therefore, she is entitled to receive temporary total disability benefits for that four-week period.

Although RJR paid claimant her salary during those four weeks she did not work, this does not relieve Arnold of its responsibility under the Workers Compensation Act. Accordingly, when the Board computes claimant's disability benefits below, claimant will be awarded temporary total disability benefits for those four weeks. And Arnold will receive a credit for three weeks of overpaid temporary total disability benefits.

### **Responsibility for claimant's October 2006 right shoulder surgery**

An injury is compensable under the Workers Compensation Act even when an accident at work only serves to aggravate a preexisting condition.<sup>36</sup> The test is not whether the accident caused a condition but, instead, whether the accident aggravated or accelerated a preexisting condition.<sup>37</sup>

The evidence is overwhelming that the work claimant performed for Arnold aggravated her neck and right shoulder. In September 2006 Dr. Gluck wrote Arnold's attorney and advised that her need for treatment at that time was related to that work. The Board adopts Dr. Stein's opinion and finds that claimant's work for The Arnold Group aggravated, accelerated, and contributed to the development of the adhesions in claimant's right shoulder. In essence, the work at The Arnold Group created the need for

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<sup>34</sup> See K.S.A. 44-525(c).

<sup>35</sup> See K.S.A. 44-510f(b).

<sup>36</sup> *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

<sup>37</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).



the October 2006 right shoulder surgery. Accordingly, the Board affirms the Judge's conclusion that Arnold is responsible for the medical expense related to that procedure.

### **Future medical treatment**

The Workers Compensation Act provides that an employer is required to provide to an injured worker such medical treatment that is reasonably necessary to cure and relieve the worker from the effects of the injury.<sup>38</sup> The Act also provides a procedure for workers to obtain post-award medical benefits.<sup>39</sup>

As indicated above, claimant's aggravation to her neck and right shoulder was merely temporary. Claimant's functional impairment for those injuries did not change. Moreover, there is a strong argument that claimant's right shoulder is better now than when she began working for Arnold. Dr. Gluck further restricted claimant's lifting in March 2007 as he reduced the maximum weight that claimant should lift from 20 pounds to 10 pounds. But it appears that modification was made because the doctor felt he had erred when he initially formulated claimant's restrictions in December 2004 rather than because claimant had sustained additional impairment to her shoulder.

In addition, claimant is now employed by RJR performing work that could potentially aggravate her upper extremities.

At this time the parties can only speculate as to claimant's future need for medical treatment. Due to the rather unusual circumstances in this claim, the Board is reluctant to order Arnold at this time to provide claimant with future medical treatment for her potential symptom flare-ups when it is very possible those flare-ups would not be Arnold's responsibility. Accordingly, should claimant require additional medical care and treatment she may make proper application under K.S.A. 44-510k.

In conclusion, claimant is entitled to receive permanent disability benefits under K.S.A. 44-510d from Arnold for a 10 percent impairment to each upper extremity at the forearm level; claimant is entitled to receive from Arnold four weeks of temporary total disability benefits during the period she was recovering from her right shoulder surgery despite the fact that RJR was paying her salary; Arnold is responsible for paying the medical expenses related to claimant's October 2006 right shoulder surgery; and claimant's present request for an authorized treating physician is denied as claimant may

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<sup>38</sup> See K.S.A. 2005 Supp. 44-510h(a).

<sup>39</sup> See K.S.A. 2005 Supp. 44-510k.

make proper application under the Act for additional medical treatment if the need should arise.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>40</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the October 6, 2008, Award as follows:

#### **Right Arm**

Philomena Wohlford is granted compensation from The Arnold Group and its insurance carrier for a repetitive trauma injury ending February 19, 2006. Based upon an average weekly wage of \$847.95, Ms. Wohlford is entitled to receive four weeks of temporary total disability benefits at \$467 per week, or \$1,868, for an injury to the right arm (shoulder), making a total award of \$1,868, which is all due and owing less any amounts previously paid.

#### **Right Forearm**

Philomena Wohlford is granted compensation from The Arnold Group and its insurance carrier for a repetitive trauma injury ending February 19, 2006, and the resulting disability. Based upon an average weekly wage of \$847.95, Ms. Wohlford is entitled to receive 20 weeks of permanent partial disability benefits at \$467 per week, or \$9,340, for a 10 percent permanent partial disability to the right forearm, making a total award of \$9,340, which is all due and owing less any amounts previously paid.

#### **Left Forearm**

Philomena Wohlford is granted compensation from The Arnold Group and its insurance carrier for a repetitive trauma injury ending February 19, 2006, and the resulting disability. Based upon an average weekly wage of \$847.95, Ms. Wohlford is entitled to receive 20 weeks of permanent partial disability benefits at \$467 per week, or \$9,340, for a 10 percent permanent partial disability to the left forearm, making a total award of \$9,340, which is all due and owing less any amounts previously paid.

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<sup>40</sup> K.S.A. 2008 Supp. 44-555c(k).

The Board notes that the Judge did not award claimant's counsel a fee for his services. The record contains a fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must submit his written contract with claimant to the Judge for approval.

The Board adopts the remaining orders set forth in the Award and the Nunc Pro Tunc Order to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant  
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge